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Cases Cited

Statutes Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

Number 72-350

UNITED STATES OF AMERICA,
Appellant,

vs.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, et al.,
Appellee.

On Appeal from the United States District Court for the Southern District of Mississippi

MOTION TO AFFIRM OR DISMISS

OPINION BELOW

The opinion of the three-judge district court is reported at 340 F. Supp. 903.

JURISDICTION

The opinion of the three-judge district court is attached hereto as Appendix "A." This opinion was rendered on March 20, 1972, and the judgment was entered on March 30, 1972. The United States gave notice of appeal on May 1, 1972, and on June 22, 1972, Mr. Justice Powell ex-

tended the time for docketing the appeal to and including August 29, 1972. The jurisdiction of this court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the State of Mississippi has imposed an impermissible burden on retail alcoholic beverage businesses conducted by federal agencies on federal enclaves within the borders of the state.

CONSTITUTIONAL PROVISIONS, STATUTE, AND REGULATION INVOLVED

Article I, Section 8 provides in part:

> The Congress shall have Power * * *
>
> To raise and support Armies, * * *
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *

Article IV, section 3 provides in part:

> To exercise exclusive Legislation in all Cases and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *

Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for de-

livery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 10265-18(c) of the Mississippi Local Option Alcoholic Beverage Control Law provides:

> The State Tax Commission is hereby created a wholesale distributor and seller of alcoholic beverages, not including malt liquors, within the State of Mississippi. It is granted the sole right to import and sell such intoxicating liquors at whoesale within the State, and no person who is granted the right to sell, distribute, or receive such liquors at retail shall purchase any such intoxicating liquors from any source other than the Commission. The said Commission may establish warehouses, purchase intoxicating liquors in such quantities and from such sources as it may deem desirable and sell the same to authorized retailers within the State including, at the discretion of the Commission, military post or qualified resort areas within the boundaries of the State, keeping a correct and accurate record of all such transactions, and exercising such control over the distribution of alcoholic beverages as seem right and proper in keeping with the provisions and purposes of this act.

Regulation 25 of the Mississippi State Tax Commission provides:

> Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month.

STATEMENT

The Appellee agrees that the material facts are not in dispute since the case was submitted on a stipulation of facts, said stipulation appearing as Appendix "D" of the brief of the Appellant. Mississippi prohibited the sale or possession of alcoholic beverages until 1966. In that year, it adopted a local option policy subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages. Mississippi Code, annotated, Sections 10265-01, et seq. The Commission was authorized to sell to retailers in the State "including, at the discretion of the Commission, any retail distributors operating within any military post * * * within the boundaries of the State * * * exercising such control over the distribution of alcoholic beverages as seem right and proper in keeping with provisions and purposes of the Act."

Pursuant to this statute, the Commission promulgated Regulation 25 (originally numbered 22), which authorizes military post exchanges, ship stores, and officers' clubs to purchase liquor either from the Commission or directly from distillers. The Regulation requires, on direct orders from such military facilities, that distillers collect and remit from the Commission the Commission's "usual wholesale mark-up." During the period in issue, the wholesale mark-up was seventeen per cent (17%) on distilled spirits and twenty per cent (20%) on wine.

The officers' and non-commissioned officers' clubs and other non-appropriated fund activities on four military bases in Mississippi had purchased liquor from distillers and suppliers when Mississippi was a "dry" State, and they decided to continue this practice rather than purchase from the Commission. Two of the bases, Keesler Air Force Base and the Naval Construction Batallion Center, are enclaves of federal jurisdiction over which Mississippi retained only the right to serve civil and criminal process. On the other two bases, Columbus Air Force Base and Meridian Naval Air Station, the federal government and the state exercise concurrent jurisdiction.

Soon after the Mississippi Regulation became effective, the military authorities commenced discussions with state officials in an unsuccessful effort to persuade them that the collection of the "mark-up" was improper. The military authorities also attempted to pay the amounts for the "mark-up" into an escrow fund until the matter could be judicially determined. The Commission, however, notified the distillers that if they did not remit the "mark-up" on their military sales to the Commission, the distillers would be subject to criminal prosecution and to de-listing, i.e., loss of the privilege of selling to the Commission for retailing in Mississippi. To obtain liquor, therefore, the military facilities were required by the distillers to pay the "mark-up". By July 31, 1971, Six Hundred Forty-Eight Thousand, Four Hundred Twenty-One Dollars and Ninety-Two Cents had been paid under protest to suppliers outside Mississippi for such "mark-ups".

The United States instituted this action on November 3, 1969, seeking a declaration that the Regulation is unconstitutional and an injunction against its continued enforcement, and seeking to recover the amount already paid for "mark-ups".

The District Court granted summary judgment against the government. It held that the constitutional grants to Congress regarding military forces and property belonging to the United States "are diminished by the express provision of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction". With respect to liquor sold by the drink on the four bases, the court made no express holding, but its judgment denied all relief to the government. Judge Cox joined the court's opinion and added in a concurrent opinion that a refund under the "mark-up" was also barred because those payments had been voluntarily made.

ARGUMENT

The Appellee relies on four holdings of this court for its grounds for an affirmance of the judgment of the District Court. These four holdings are: (1) **Ohio v. Helvering**, 292 U. S. 360, 78 L. Ed. 1307, 54 S. Ct. 725 (1934), that economic burdens imposed on a sovereign's conduct of alcoholic beverage business for a profit did not interfere with sovereign functions; (2) **Collins v. Yosemite Park Company**, 304 U.S. 518, 82 L. Ed. 1502, 58 S. Ct. 1009 (1938), where the State excise tax on alcoholic beverages may constitutionally be applied to purchases made for resale by a federal instrumentality on a federal enclave; (3) **Paul v. United States**, 371 U.S. 245, 9 L. Ed. 2nd 292, 83 S. Ct. 426 (1963), that military procurement by non-appropriated fund instrumentalities must comply with state price control regulation, where such regulation was authorized at the time federal jurisdiction over the military enclave in question was acquired; (4) **Seagram and Sons v. Hostetter**, 384 U.S. 35, 16 L. Ed. 2nd 336, 86 S. Ct. 1254 (1966), that the XXI Amendment authorizes state alcoholic beverage wholesale price control that does not otherwise violate the United States Constitution.

No reasons have been advanced by the Solicitor-General for a reconsideration of any of these holdings. The **Ohio** and **Seagram** cases, supra, are not even cited in the brief of the Appellant. The **Collins** and **Paul** cases, supra, are cited without a full disclosure of what the court actually held.

1. The wholesale "mark-ups" in issue did not interfere with the performance of any military function.

The Solicitor-General's statement of Questions Presented wrongly suggest that the "military procurement" allegedly interfered with was for military rations. This procurement was in fact by military social clubs for re-

sales at retail that yielded profits devoted to recreational activities enjoyed by military personnel, their families and their guests. There is no proof that even these activities were in any way hampered by Mississippi's alcoholic beverage laws.

The State of Mississippi collects the challenged wholesale "mark-ups" from all suppliers of wines and spirits because it is by law the exclusive wholesaler for the entire state. The wholesaler functions for which the "mark-up" was collected were performed by the suppliers only in the case of direct sales to these military clubs. The clubs had the option of purchasing from the state instead of from the suppliers, in which case these wholesale functions would have been performed by the state.

The clubs could not, under either option, perform themselves the wholesaler functions for which the "mark-up" was paid. No facts were adduced to show that the suppliers, who set the prices paid by the clubs, would not have kept for themselves the wholesale "mark-up" collected from these clubs if they had not been compelled by Mississippi law to remit these "mark-ups" to the state.

These clubs are seeking a price advantage that no other retailer of alcoholic beverages, in Mississippi or elsewhere, customarily receives, to wit, a wholesaler's price that excludes any compensation for wholesaling services. Moreover, the challenged regulation exempted the club purchases from the gallonage tax on wine and spirits. (These taxes were Two Dollars and a Half on distilled spirits, a Dollar per gallon on sparkling wines and champagnes and Thirty-Five Cents per gallon on other wines.) What prices the clubs would have paid, absent the challenged regulation, is purely speculative but they might well have paid more. The only policy

reason advanced below by the armed services for even lower prices than the clubs received, that of uplifted military morale, has apparently been abandoned by the Solicitor-General, yet no other policy justification has been suggested.

2. Neither the complaint, the federal regulation involved, nor the authorizing federal statute distinguishes between bases where the United States has exclusive jurisdiction and bases where state and federal jurisdiction is concurrent.

A copy of the complaint is attached as Appendix "B". It seeks an injunction against enforcement of Mississippi's law and regulations on all of the bases involved and a money judgment for Three Hundred Nineteen Thousand, Seven Hundred Forty Dollars and Fifty-One Cents ($319,740.51), the total "mark-ups" then collected. The stipulated facts as to the total amount of the disputed mark-ups at the time of the trial, Six Hundred Forty Eight Thousand, Four Hundred and Twenty One Dollars and Ninety-Two Cents ($648,421.92), does not permit the entry of any judgment based only upon sales made to particular bases. The military regulations relied upon applied to "any camp, post, station, base or other place primarily occupied by members of the armed forces within the United States" (See Department of Defense directive 1330.15 and page 32a, Jurisdictional Statement).

The federal statute relied upon to authorize these regulations does not even limit them to military bases. The statute applies to conduct "at or near" military bases and does not require that the regulated activity occur on any base. (See Draft Extension Act of 1951, Section 6, 50 U.S.C.A., App. 473, as quoted in paragraph seven of the complaint and in the opinion below; Jurisdictional Statement, page 5a.)

The Solicitor-General suggested that this case presents a separate question as to "military bases over which the jurisdiction of the United States is 'exclusive'" is not borne out by the record made below. There was no discrete presentation of this question to the District Court and it should not be treated by this court as separable from the basic challenge of Mississippi's authority over sales to military clubs presented by the complaint.

3. As stated in the brief of the Appellee, the only constitutional question presented by the decision below is whether Mississippi has imposed an impermissible burden on retail alcoholic beverage businesses conducted by federal agencies on federal enclaves within the borders of the state.

The court below correctly resolved this question by an analysis of the limits set by the XXI Amendment on federal power over the alcoholic beverage business. The Jurisdictional Statement attacks the correctness of this holding by ignoring what this court did in **Collins v. Yosemite Park**, supra, and holding the application of California's gallonage tax to sales made for resale in the Park. Instead the statement focuses attention on what the court said in refusing to compel a park concessionaire to apply for a California retailer's permit. California's tax was sustained as to all sales made to the concessionaire for resale at the Park because California had reserved taxation rights in its session of federal jurisdiction. But California could not validly reserve a power it could not constitutionally possess. If, as the Solicitor-General urges, the federal constitution inhibits state taxation of liquor sales made for resale at federal enclaves, California's gallonage tax on the sales made for resale in Yosemite Park would have been invalidated by this court instead of sustained.

Mississippi's wholesale "mark-up" is an inescapable aspect of its statutory wholesaling monopoly. When, under the options given by Mississippi's regulations, the suppliers are willing to perform the wholesaling functions themselves, collect the wholesale "mark-up" from the military clubs and remit it to the state, for the privilege of importing alcoholic beverages into the state, the "mark-up" payments may be treated as an excise tax. But this makes no constitutional difference. The XXI Amendment, as the court below correctly held, authorizes the imposition of such a non-discriminatory burden on the business of retailing alcoholic beverages imported into the state, regardless of where these retail businesses are located or who conducts them. The federal government has no constitutional right to conduct a retail alcoholic beverage business at any federal enclave within the borders of any state, free of such economic burdens as the state may impose on the importation of such beverages into the state for its own control and revenue purposes.

The question of whether a state may license such a federally authorized retail business when conducted on a federal enclave within its borders was not considered by the court below. When the clubs refused to apply for retailer's permits, Mississippi did not try to enforce this requirement and the legality of the permit requirement may only be decided by further litigation. All that is presented here is the legality of Mississippi's control over the importation of bottled wines and spirits destined for resale at a profit.

No policy reasons have been suggested by the Solicitor-General for letting any federal agency escape the economic burdens incidental to state control when it chooses to resell alcoholic beverages at a profit, either by the drink or in packaged form. Nor are any policy reasons suggested for distinguishing between retail businesses

conducted by domestic military clubs under a uniform federal regulation, expressly applicable to all, merely because some acts ceding the land where they operate, grant more federal jurisdiction than others grant.

None of the statements as to jurisdiction in any of the acts of cession here involved, says anything about control of alcoholic beverage abuse. The XXI Amendment, which antedated all of these acts, gave Mississippi continuing right to control the terms of alcoholic beverage importation for resale within the borders of the state. The Solicitor-General's suggestion that the word "use" in the amendment excludes commercial use and means only individual consumption betrays an extraordinary indifference to the amendment's purpose in history. It has produced a steady state by state elimination of consumption controls in favor of commercial regulation. While these systems of state commercial regulation differ widely, they all recognize the controls on personal consumption seriously compromise individual liberty. One reason for the XXI Amendment is that a United States Justice Department concerned with who drank what and where turned out to be an unappealing spectacle.

CONCLUSION

Appellee respectfully submits that the judgment of the United States District Court for the Southern District of Mississippi be affirmed and the appeal dismissed.

Respectfully submitted

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Certificate

I, Guy N. Rogers, Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Motion to Affirm or Dismiss to Honorable Erwin N. Griswold, Solicitor-General of the United States, Department of Justice, Washington, D. C. 20530, this the 26th day of September A. D., 1972.

Guy N. Rogers
Assistant Attorney General